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Columbia Law School has the misfortune this year to lose the services of Professor Burdick, Professor Kirchwey, and Professor Redfield. Every one knows how much they enhanced the reputation of the School by their teachings and their writings. The loss falls with particular weight on the LAW REVIEW. Professor Burdick and Professor Kirchwey acted as Trustees of the REVIEW for many years, and they and Professor Redfield were always ready to help it in every possible way. We take this occasion to thank them for their generous assistance in the past, and to express the hope that, despite their retirement from active teaching, they will still let us come to them for advice in the future.

NOTES.

THE STATUS OF ARMED MERCHANT SHIPS.—In any discussion of the question of armed merchant ships, the three classes, privateers, auxiliary cruisers, and defensively armed trading vessels, must be carefully distinguished. Privateers or private armed vessels were authorized to cruise for the profit of the owners and to take prizes;[1] they were commissioned for offensive operations, and they could exercise the belligerent right of visit and search.[2] As a consequence of the depredations of these vessels, due to the lack of sufficient governmental

[1]2 Halleck, International Law (4th ed.) 128; Hall, International Law (6th ed.) 518.

[2]Oppenheim, International Law (2nd ed.) 534 n. 3.

control, merchant vessels began to travel armed and to resist visit and search.[3] The latter differed from privateers in that they were not commissioned and were not entitled to operate offensively.[4] With the abolition of privateering by the Declaration of Paris[5] in 1856, merchant vessels armed for defense seem to have disappeared for some time. During the Franco-Prussian War, the King of Prussia issued a manifesto purporting to provide for the establishment of a volunteer navy. The crews of privately owned merchant vessels hired as auxiliary cruisers by the government were to be placed under naval discipline and supplied with the regular naval uniform. These were *public* armed vessels, and the master and crew were under direct governmental control. France protested on the ground that this was a violation of the Declaration of Paris. Though as a matter of fact no such volunteer navy was formed, there would have been no violation of the Declaration of Paris in its formation.[6] The Seventh Hague Convention of 1907 had for its purpose the regulation of conditions under which merchantmen could gain the status of auxiliary cruisers.[7] Owing to the insistence on the right of converting merchant vessels to warships on the high seas by Germany and some other powers, the English Admiralty decided to revive the practice of arming merchant vessels for defense.[8]

The status of merchantmen armed for defense is not so difficult of definition as it would seem from the present heated controversy on the subject. The test that should be applied is, not the capacity of the armament for offensive use, but the use for which it is actually intended. Is the purpose of the vessel to trade, or is it to cruise in search of prize?[9] Though resistance by the master of a neutral trading vessel is illegal,[10] resistance by the master of a belligerent merchantman has always been conceded to be a perfectly legal act.[11] This seems to be a necessary corollary to the proposition that private prop-

[3]Stark, Abolition of Privateering, 113.

[4]Baty & Morgan, War; Its Conduct and Legal Results, 336; Hooper *v.* United States (1887) 22 Ct. Cl. 408, 427 *et seq.*

[5]Declaration of Paris, Art. I. The United States did not sign or ratify the Declaration of Paris because it did not provide for the exemption from capture of private property at sea, but in the war with Spain neither country used privateers. Stockton, International Law, 48.

[6]Higgins, War and the Private Citizen, 119 *et seq.*; Stark, Abolition of Privateering, 159 *et seq.*; Higgins, The Hague Peace Conferences, 313.

[7]Seventh Hague Convention (1907) Arts. 1-6.

[8]8 American Journal of International Law, 705.

[9]According to the memorandum of the United States State Department of March 25, 1916, neutrals, for the purposes of port regulations, may presume merely from the presence of armament, in the absence of other circumstances, that vessels have lost their peaceful character; but the belligerent, before attacking such vessels without warning, must have conclusive evidence of an intention to use the armament offensively.

[10]Hall, *op. cit.*, 733.

[11]C. Dupuis, Le Droit de La Guerre Maritime, 121; 2 Oppenheim, *op. cit.*, § 181; The Catharina Elizabeth (1804) 5 C. Rob. 232, in which Lord Stowell stated that there was a broad difference between resistance by an enemy and a neutral master, the enemy master being in the position of *lupum auribus teneo*. *Cf.* 2 De Pistoye et Duverdy, Prises Maritimes, 51. The crew of a merchant vessel which resists are entitled to the status of prisoners of war. U. S. Naval War Code, Art. 10.

erty of a belligerent citizen at sea is not exempt from capture by the enemy. The position of defensively armed merchant vessels is entirely different from that of auxiliary cruisers or privateers, in that the first class is not authorized to operate offensively on pain of subjecting itself to the charge of piracy.[12] Since neutral goods in enemy ships are not confiscable, they are not forfeited by the resistance of the enemy master,—even armed resistance.[13] As respects entry and departure from neutral ports, these vessels have always been treated as trading vessels.[14] The fallacy of the German contention[15] that merchantmen of a belligerent nationality have not a right to resist capture, lies in the mistaken view that the relations of belligerent warships to neutral and enemy trading vessels are essentially the same. In reality, the neutral in resisting visit and search is resisting an act which is not hostile, while the belligerent merchant vessel is resisting a hostile act which he has a right to resist.[16]

According to the custom of international law, a belligerent merchant vessel has a right to be warned before it is sunk or captured.[17] During the period before the abolition of privateering, merchantmen rarely went unarmed.[18] It is accordingly rather convincing of the right of an armed merchantman to warning that no mention is made of any exception in their case.[19] Of course, the question of warning was of only academic interest till lately, since warships in the old days gave warning to the eye, whether they wished or not, long before they got within range. Arming of merchant vessels against privateers was effective because, defensively, privateers were weak,[20]

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[12]2 Oppenheim, *op. cit.*, §§ 85, 181, 254; Hall, *op. cit.*, 525; *contra*, 15 U. S., Appendix, 7 (Wheaton's notes). No distinction is taken between armed and unarmed merchantmen. It should be noted here that according to the British instructions to armed merchantmen the guns are to be used only for defense. 162 Proceedings U. S. Naval Inst. 636. In Snow, International Law (2nd ed.) 83, the author, writing in 1890, said: "It may be reasonably expected in coming naval wars that steamers of the great mail lines will be armed so as to defend themselves from attack, rather than seek convoy, and the defense could be legitimately carried to the point of a seizure of the attacking vessel, or a recapture if once taken."

[13]The Nereide (1815) 13 U. S. 388. Some writers, *e. g.*, Twiss, The Law of Nations in Time of War, 187 and Hall, *op. cit.*, 734, have regarded The Fanny (1814) 1 Dod. 443, as *contra*. The cases, however, are clearly distinguishable, as in the former the ship was defensively armed, while The Fanny was equipped with a letter of marque and authorized to take prizes. *Cf.* The Catharina Elizabeth, *supra*.

[14]22 Revue de Droit International Public 6, 193 *d*; 2 Moore, Digest of Int. Law, 1070; see United States *v.* Quincy (1832) 31 U. S. 445, 466.

[15]Schramm, Das Prisenrecht in seiner Neuesten Gestalt, 308 (translated in Senate Doc. 332, 64th Congress, 39).

[16]8 American Journal of International Law, 715.

[17]2 Oppenheim, *op. cit.*, § 181; Stockton, International Law, § 158.

[18]The Nereide (1815) 13 U. S. 388, 426.

[19]It is true that Marshall, C. J., in The Nereide, *supra*, at p. 430, says of the ship libeled, which was an armed merchant vessel captured by an American privateer: "She is an open and declared belligerent; claiming all the rights, and subject to all the dangers of the belligerent character." It is to be noted, however, that the question of warning was not raised in the case. Moreover, the Chief Justice seems to have had in mind the effect of resistance.

[20]Hooper *v.* United States, *supra*, 437.

and the same inducement for defensive armament would apply to the case of submarines. If armed merchant vessels are not accorded the right of warning before attack, the same right might be denied to unarmed merchantmen, since they might easily sink a submarine by ramming.[21] Though submarines are defensively so weak that it is very dangerous for them to warn merchant vessels, whether armed or unarmed, this fact cannot affect the neutral rights involved.[22] Inasmuch as belligerent merchantmen are accorded the right of warning, and no distinction has ever been drawn between the rights of defensively armed and unarmed merchant vessels previous to the present war, the rules that apply to one would certainly seem to apply to the other. The German contention would subject such vessels to the risks of warships without according them any of the offensive rights of warships, such as visit, search, and capture.[23]

THE ADOPTION OF THE COMMON LAW.—The common law of England, in so far as it was suitable to new conditions, was in force in this country before 1776, and the decisions of the higher English courts were of controlling authority in the colonies.[1] After the Revolution, the so-called English common law, when it was not adopted as a system of jurisprudence by constitutional provision[2] or by statute,[3] was recognized, without legislative declaration, as part of the law of the eastern states, under the doctrine that the original law of conquered or ceded territory is in force until abrogated.[4] Of course, the common law is not uniform throughout the states. In some, the common law prior

[21]Marshall, C. J., in The Nereide, *supra*, at p. 428, in speaking of resistance to the right of search of neutral goods by the arming of a belligerent merchant vessel, says: "It is difficult to perceive in this argument any thing which does not also apply to an unarmed vessel. In both instances it is the right and the duty of the carrier to avoid capture and to prevent a search. There is no difference *except in the degree of capacity to carry this duty into effect.** The argument would operate against the rule which permits the neutral merchant to employ a belligerent vessel."

*The italics are the writer's.

[22]Johnson, J., in The Atalanta (1818) 16 U. S. 409, which affirmed the doctrine of The Nereide, *supra*, in speaking of the obstruction of the belligerent's right of search by the lading of neutral goods on board an armed belligerent carrier, said, at p. 425: "It cannot be expected that the belligerent will rest his complaint upon the humiliating ground of his inability to subdue his enemy; and if he should, the neutral may well reply it is his affair or his misfortune, but ought not in any of its consequences to affect the rights of the neutral."

[23]*Cf.* The Atalanta, *supra*, 426, 427.

[1]Black, Law of Judicial Precedent, 428; Van Ness *v.* Packard (1829) 27 U. S. 137, 144; Wheaton *v.* Peters (1834) 33 U. S. 591, 659.

[2]See Ray *v.* Sweeney (1878) 77 Ky. 1; Clawson *v.* Primrose (1873) 4 Del. Ch. 643, 652, 666.

[3]See Chilcott *v.* Hart (1896) 23 Colo. 40, 45 Pac. 391; Kreitz *v.* Behrensmeyer (1894) 149 Ill. 496, 36 N. E. 983; Reno Smelting etc. Works *v.* Stevenson (1889) 20 Nev. 269, 21 Pac. 317; Dawson *v.* Coffman (1867) 28 Ind. 20.

[4]1 Bl. Comm. *107; 1 Kent, Comm., *472; American Ins. Co. *v.* Canter (1828) 26 U. S. 511, 542. In Louisiana, however, civil matters have always been governed by the civil law, though the common law is applied in criminal procedure. State *v.* Depasse (1879) 31 La. Ann. 487.